84-1141

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL HOLLAND,
ARNOLD HOLLAND,
PAUL MURPHY,
and LAWRENCE JOHN HOLLAND,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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ISSUE

WHETHER A MOBILE HOME, FURNISHED AS A DWELLING, IS SUBJECT TO THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Michael Holland, Arnold Holland, Paul Murphy and Lawrence John Holland, appellants below, petition this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 31, 1984.

OPINIONS BELOW

The opinion or appeal below is reported as United States v. Holland, 740 F.2d 878 (11th Cir. 1984), rehearing denied ___ F.2d ___ (11th Cir. 1984), and is found as Appendix "A" to this petition.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on August 31, 1984. Petition for Rehearing was denied on November 16, 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. History of the Case

Petitioners were indicted for possession with intent to distribute in excess of 1,000 pounds of marijuana and conspiracy to possess with intent to distribute in excess of 1,000 pounds of marijuana, in violation of 21 U.S.C. §§ 841 (a)(1) and 846 and 21 U.S.C. § 2. During the pretrial proceedings appellants moved to suppress marijuana which was seized during the warrantless search of two mobile homes in which they were traveling. Upon the conclusion of the suppression hearing held in this cause, the district court

refused to suppress said marijuana and the petitioners entered conditional pleas of guilty, pursuant to Fed. R. Crim. P. 11 (a)(2), to both counts of the indictment against them. All petitioners were sentenced to imprisonment, with terms ranging from three years to eight years incarceration.

A timely appeal was taken to the Court of Appeals for the Eleventh Circuit. On appeal, the Eleventh Circuit, without oral argument, affirmed petitioners' convictions. A timely motion for rehearing and rehearing en banc was denied on November 16, 1984.

B. Statement of the Facts

The warrantless arrests of petitioners was preceded by information provided by a previously "unreliable

tipster" to members of state and local law enforcement agencies in Jacksonville, Florida. This tipster was cooperating with law enforcement agents as the result of his arrest for possession of one pound of marijuana and his potential prosecution for violation of his probation.

The tipster gave the officers unsubstantiated information concerning a loan made by Aaron Holland 1/ to him. A series of conversations between Mr. Holland and the tipster, Mr. Sutton 2/ were instituted. These calls

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1/ Aaron Holland was never charged as a defendant in the prosecution below.

2/ According to the testimony of one of Mr. Sutton consented to the recorded interception of these phone conversations so that no Title III intercept was sought or obtained.

commenced approximately one week prior to petitioners' arrest and occurred over a period of six days. They failed, however, to bear any substantive fruit.

In conjunction with the calls, Mr. Sutton indicated that he had been recruited by Aaron Holland transport marijuana with members of Mr. Holland's family. Significantly, however, Mr. Sutton was never called upon and did not participate in any such activity.

Visual surveillance of the Holland home commenced. On the morning of March 15, 1983, agents surveilling the home observed a jeep, a van and two Winnebagos depart from the residence. Surveillance teams followed these vehicles to their ultimate destination, a home located in Fort Meyers, Florida.

Once at the Fort Meyers home, the agents began their surveillance by land, air and sea. No activity was observed for twenty-four hours, however, the next afternoon the agents saw the vehicles depart from the home. According to some of the agents, the two Winnebagos appeared to be riding lower than they had previously. A command was given to stop the vehicles and arrest its occupants. This command was followed and all of the petitioners were stopped and arrested. The vehicles, in which petitioners were traveling, were searched and marijuana was seized from the interior of the Winnebagos. No warrant was obtained prior to the arrests and searches.

REASONS FOR GRANTING WRIT

By this action, petitioners present the issue of whether a mobile home is protected by the warrant requirement of the fourth amendment or whether it falls within the automobile exception to the warrant requirement, first set forth in Carroll v. United States, 267 U.S. 132 (1925). This Court has accepted jurisdiction in People v. Carney, 34 Cal.3d 597, 668 P.2d 807 (Cal. 1983), cert. granted sub nom, California v.Carney, 104 S.Ct. 1589, 80 L.Ed.2d 122 (1984), to resolve this precise issue. For purposes of judicial economy, this Court should accept jurisdiction in this action and resolve it in conjunction with the action pending in Carney.

The genesis of the automobile exception is found in Carroll v. United States, 267 U.S. 132 (1925), wherein the Court stated:

> [T]he guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

Carroll was extended in Chambers v. Maroney, 399 U.S. 42 (1970). In Chambers, inculpatory evidence was discovered in a

search carried out at the police station after the defendant was arrested. Citing Carroll, and noting "the opportunity to search is fleeting since a car is readily movable", the Chambers court nevertheless found the warrantless station house search justifiable because probable cause still existed and the car was still a fleeting target for a search:

> The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.

Id. at 52.

Despite the Court's emphasis on the inherent mobility of the automobile as the reason for dispensing with the warrant requirement in car searches, it is apparent that mobility alone cannot support the exception as it now stands. In Chambers, for example, the owner of the vehicle was in custody and the vehicle was in police hands. There existed little realistic danger of the evidence disappearing. Similarly, in Cady v. Dombrowski, 413 U.S. 433 (1973), the car was disabled in an accident and was in police custody, while the sole occupant was arrested and hospitalized. In Cooper v. California, 386 U.S. 58 (1967), the defendant was under arrest and his car impounded by the police when the search took place. This line of

cases demonstrates that mobility was insufficient support for the automobile exception.

Stronger justification for the exception was stated in Cardwell v. Lewis, 417 U.S. 583 (1974). The Cardwell plurality found that, "The search of an automobile is far less intrusive on the rights protected by the fourth amendment than the search of one's person or of a building." Id. at 590, quoting Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973). This is so because:

> [O]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfare where its occupants and its contents are in plain view.

Cardwell at 590. Cardwell makes abundently clear that in determining the extent of fourth

amendment protection afforded a car, "it is the right to privacy that is the touchstone of [the] inquiry." Id. at 591.

The inherent mobility of a car has been displaced as the jurisprudential foundation of the automobile exception by the "diminished expectation of privacy which surrounds the automobile". United States v. Chadwick, 433 U.S. 1, 12 (1977). The Chadwick Court explicitly recognized that mere mobility of a car did not explain warrantless searches of automobiles "in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent". Id. at 12, quoting Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973). In Chadwick, the Court ad-

amendment protection afforded a car, "it is the right to privacy that is the touchstone of [the] inquiry." Id. at 591.

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dressed the subtle yet significant constitutional distinction between a warrantless search, supported by probable cause, of an automobile, and a warrantless, probable-cause search of a footlocker contained within an automobile. The Chadwick Court after consideration of the automobile exception cases, concluded that "[t]he factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker". Id. at 13.

The factors the Chadwick Court found relevant in distinguishing the privacy interest of the possessor of a footlocker from those of the possessor of an automobile are enlightening in the instant context as well. Whereas an automobile is not characteristically used as a

repository of personal effects, a motor home is designed for that purpose, even more so than luggage. Additionally, the interior and contents of a motor home are not exposed to the public, and the occupants, facilities, and personal items are not in plain view.

The motor home is intended to be a home on wheels, and is designed to provide those within the maximum privacy as possible. It is designed and constructed to protect the privacy interests of those within to a far greater degree than an automobile. Considering that a motor home is commonly used as a home away from home, society must be willing to acknowledge as legitimate and reasonable the privacy expectations of one who possesses a motor home. The fact that a motor home is used as a short-term

residence away from a primary residence is of no more constitutional significance than the fact that a motel room is a temporary, secondary residence. In the latter instance, "[n]o less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures". Stoner v. California, 376 U.S. 483, 490 (1964) (citation omitted).

Thus, the history of the principles underlying the automobile exception to the warrant requirement demonstrate that the factors which allow a warrantless search of an automobile are inapplicable where the warrantless search of a mobile home are at issue.

Instead, the focus of analysis must be founded upon the question of whether individuals traveling in a mobile home have the same expectation of privacy as those traveling in an ordinary car. Clearly, the answer to this question is no. When traveling and living in a mobile home, shades can be drawn so others cannot see in. Mobile homes are equipped with beds, showers and bathrooms. By its very structure, a mobile home permits individuals to engage in the most private of activities without exposure of those activities to the general public. One may change clothes, eat a meal and take a shower in a mobile home without the fear of unwanted scrutiny from fellow travelers. Mobile

homes " ...are generally designed and used as residences; their essential purpose is to provide the occupant with living quarters, whether on a temporary or permanent basis." Carney, 668 P.2d at 812. These homes often serve as a repository of personal property in a manner comparable to "...a home, an office, or certainly a piece of luggage". Id. at 813.

In reaching a contrary result below, the Court of Appeals for the Eleventh Circuit erroneously concluded that no warrant was necessary because the two Winnebagos were not being used as residences by petitioners at the time of their stop. Holland, 740 F.2d at 880-881. By relying solely on the use question, that court

utilized as inappropriate standard for the determination of the issue presented. The apparent use of the vehicle, while relevant, does not in and of itself determine whether an individual has manifested a reasonable expectation of privacy in the object searched.

The fourth amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1 (1977). The issue is not whether the motor home is somehow a "private space", viewed in the abstract, but whether the petitioners had a reasonable expectation of privacy therein. Rakas v. Illinois, 439 U.S. 128, 139-43 (1978). A fourth amendment privacy inte-

rest exists if there is a reasonable expectation that uninvited and unauthorized persons will not intrude into a particular area. The crucial factor is whether a person's expectations are founded on "understandings that are recognized and permitted by society." Rakas, 439 U.S. at 144, n.12.

The automobile exception to the warrant requirement is inapplicable here. The nature of a mobile home is different from that of an automobile and is comparable to a temporary home. This Court should grant certiorari herein in order that it may determine this issue, which is presently pending before this Court in Carney, in a uniform fashion.

CONCLUSION

For these reasons, petitioners' respectfully urge this Court to grant certiorari and reverse the holding of the Circuit Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copies of this Petition for Writ of Certiorari were mailed this 14th day of January, 1985, postage prepaid, to Charles Caruso, Esquire, Assistant United States Attorney, 500 Zack Street, Room 410, Tampa, Florida 33602, counsel for respondent. I further certify that all parties required to be served have been served.

Elizabeth L. White
Attorney

A P P E N D I X

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael HOLLAND, Lawrence John Holland, Arnold Holland, and Paul Murphy,
Defendants-Appellants.

No. 83-3668

Non-Argument Calendar.

United States Court of Appeals
Eleventh Circuit.

August 31, 1984

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, TJOFLAT and ANDERSON, Circuit Judges.

PER CURIAM:

The major issue argued in this appeal is whether a motor home is protected by the warrant requirement of the Fourth Amendment, or whether it falls within the automobile exception to the warrant

requirement. We hold that the issue cannot be decided in categorical terms and that in this case, the vehicle was not being used as a home in any sense of the word so that the automobile exception was properly applied. There being probable cause for the search which revealed a large quantity of marijuana, and no error in considering "wire tape" and "body bug" evidence, the defendants' convictions for conspiracy to possess and possession of marijuana in excess of 1000 pounds, 21 U.S.C.A. §§ 841(a)(1), 846, and 18 U.S.C.A. § 2, are affirmed.

Briefly, the facts which established probable cause for the authorities to believe that the motor home was being used to transport marijuana are as follows. When one pound of marijuana was found in his car at the time of his arrest, an informant in this action admitted that

he purchased the marijuana with money supplied by Aaron Holland, brother of defendants, and that he had distributed marijuana for Aaron Holland in the past and had been approached by Holland recently to transport a large quantity of marijuana. Monitored telephone calls by the informant to Holland confirmed an upcoming deal. Thereafter, two rented Winnebago motor homes, the subject of this controversy, appeared at Holland's home.

The two motor homes, followed by a 1983 Dodge-Ram van, and a 1982 Jeep Wagoneer, convoyed south to Fort Myers, Florida. Along the way the motel rooms were rented. Various conversations by CB radios were carried on between the vehicles. Numerous stops were made. Upon arrival at a Fort Myers Ramada Inn, the motor homes were parked across the street from the motel and, thereafter, the larger motor home

departed following a cream or light-colored Ford truck to a residence on Ellis Drive. The truck returned to the motel and the two occupants entered the motel. At about this time, a consented to electronically-monitored conversation between Holland and the informant confirmed that a transaction was in process. Thereafter, the jeep and smaller motor home proceeded to the Ellis Road residence.

The motor homes were then observed leaving the residence, riding lower in the rear. The vehicles' windows, previously closed, were now open. When stopped shortly thereafter, approximately 1495 pounds of marijuana were found, in plain view, in the motor homes and smaller quantities of marijuana and handguns were found in the van and the jeep. Michael

Holland was found to have signed rental agreements for the lease of the motor homes.

The automobile exception to the Fourth Amendment warrant requirement generally permits warrantless searches of motor vehicles where there is probable cause to believe that the vehicle contains contraband. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The rationale for warrantless searches of such vehicles is based on exigency and the inherent mobility of the vehicle as well as a diminished expectation of privacy in automobiles. See United States v. Ross, 456 U.S. 798, 805-806, 102 S.Ct. 2157, 2162, 72 L.Ed.2d 572 (1982); United States v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977); Chambers v. Maroney, 399 U.S. 42, 48-52, 90 S.Ct. 1975, 1979-

1981, 26 L.Ed.2d 419 (1970); Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). Defendants argue that the mobility aspect of these early decisions has shifted to a diminished expectation of privacy, and that persons do not have any different expectation of privacy in a motor home than they have in a home. Since the motor homes were being used solely for transportation, we need not decide whether, if the vehicle was indeed being used as a place to live, the defendants could prevail on this argument. The cases relied upon by the defendant, furthermore, are not factually similar to the case at hand.

In People v. Carney, 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983), cert. granted, California v. Carney, ___ U.S.____, 104 S.Ct. 1589, 80 L.Ed.2d 122 (1984), upon which the defendants rely,

the Supreme Court of California held that where the motor home was not moving, was furnished as a dwelling and was used principally as a dwelling, it was not subject to search under the warrant requirement's "automobile exception." Although currently pending on certiorari in the United States Supreme Court, the Carney decision will not reach this action where the motor homes were rented for transportation purposes and the occupants had not used the motor homes as a dwelling. Defendants rented motel rooms during their travels, parked the motor homes in commercial parking lots, had no personal living effects therein and were stopped while in transit on the highway. The Ninth Circuit has held that the "automobile exception" is inapplicable to a motor home. United States v. Williams, 630 F.2d 1322 (9th Cir. 1980).

The Court relied on the immobility of the particular motor home in question and the general distinction between the difference in use between a motor home and an automobile.

> People typically do not remain in an auto unless it is going somewhere. The same is not true of a motor home, in which people can actually live. In the ordinary motor home, the glass is tinted or shades can be drawn so that passers-by cannot peer in. Moreover, many, like the one in this case, have beds and fully equipped baths, making them in some senses more akin to a house than a car.

630 F.2d at 1326.

In a subsequent case, a Ninth Circuit panel decided that under Williams, "we cannot sanction the search at issue here merely on the basis of the 'automobile exception'", but upheld a search of a motor home as a warrantless "protective sweep" search incident to arrest. United States v. Wiga, 662 F.2d 1325, 1329 (9th Cir.

1981). The Ninth Circuit has yet to determine whether the mere configuration of the vehicle is controlling or whether the decisions will turn on the use being made of the vehicle.

As for the case at hand, we hold that under the facts known to the officers at the time of the search, the motor homes were being used as automobiles, or trucks, and that the standard of reasonableness that applies to such vehicles applies here. The use of a vehicle, not its shape, should control the standard that applies. As an analogy, the extent that there may be different Fourth Amendment standards for a home and a business would not depend upon whether the business was in a building that looked like a home. The difference in standards is based on the reduced expectation of privacy in a business.

See Donovan v. Dewey, 452 U.S. 594, 598-99, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262 (1981) (holding that expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home); Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)(holding that to decide whether or not a give "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented because the Fourth Amendment protects people, not places).

The decision that the use of a vehicle, not its configuration, controls the application of the automobile exception to the warrant requirement decides this case. The arguments that there was insufficient probable cause for an automobile exception search and that the court

improperly considered "wire tap" and "body bug" evidence determining that there was probable cause for the searches are without merit and need no discussion.

AFFIRMED.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the search of two rented motor homes, which were used solely for transportation purposes and were stopped while in transit on the highway, was not justified under the "automobile exception" to the Fourth Amendment's warrant requirement.

Petitioners were convicted in the United States District Court for the Middle District of Florida, following the acceptance of their conditional guilty pleas, on one count of conspiracy to possess with intent to distribute over 1000 pounds of marijuana, in violation of 21 U.S.C. 846, and one count of the substantive offense, in violation of 21 U.S.C. 841(a)(1), and 18 U.S.C. 2. Petitioner Michael Holland was sentenced to concurrent terms of eight years' imprisonment on each count. Petitioner Lawrence Holland was sentenced to concurrent terms of five years' imprisonment on each count. Petitioners Arnold Holland and Paul Murphy were

each sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A11).

1. The facts adduced at the suppression hearing established that an informant, who had been arrested after one pound of marijuana was discovered in his car, told authorities that he had bought the marijuana with money given to him by Aaron Holland, the brother of three of the petitioners. The informant further stated that he had distributed marijuana for Holland before and that Holland had recently approached him about transporting a large quantity of marijuana. Telephone calls by the informant to Holland, which were monitored with the informant's consent, confirmed that a drug deal was about to take place. Thereafter, police observed two rented Winnebago motor homes arrive at Holland's home. Pet. App. A2-A3; Tr. 6-15.

In the early morning hours of March 15, 1983, the two motor homes, followed by a jeep and a van, left the Holland residence and traveled south to Fort Myers, Florida. Surveillance agents following the vehicles observed that several times during the nighttime journey the vehicles would pull off the road to wait for several minutes before resuming their trip, leading the agents to surmise that the travelers were trying to detect or avoid surveillance. All four vehicles stopped at a truck stop in Haines City, Florida, for about half an hour, and, at about 5:00 a.m., the travelers stopped at a Holiday Inn in Lake Placid, where they parked all four vehicles and rented two motel rooms. Tr. 18-24.

At about 10:30 that morning, four people left the two motel rooms and continued their journey. Agents were able to identify three of the four men as petitioners Michael Holland, Arnold Holland, and Paul Murphy. The four vehicles were followed to the Ramada Airport Hotel in Fort Myers, Florida. The jeep and the van were parked in the

hotel parking lot, and the two Winnebagos were parked in the parking lot of the shopping center across the street (Tr. 22-24). Later that day the agents learned that petitioner Michael Holland had rented a motel room (Tr. 31).

That afternoon, one of the motor homes departed and followed a light-colored Ford Truck to a residence on Ellis Road in Fort Myers. The truck returned to the motel, and two people entered the Ramada Inn. Meanwhile, a conversation between the informant and Aaron Holland, which was monitored with the informant's consent, confirmed that a drug transaction was in progress. That same evening, agents observed the second motor home and the jeep travel to the Ellis Road residence; the jeep later returned to the Ramada Inn. The next morning, March 16, 1983, the four men left the motel and returned to the Ellis Road address where the motor homes were parked. Tr. 25-32.

In the afternoon, agents saw the motor homes leave the Ellis Road residence. They noticed that the motor homes were riding lower in the rear and weaving around on the road. The windows of the vehicles, previously closed, were now open. The police stopped the motor homes and discovered inside almost 1500 pounds of marijuana. The van and the jeep were also stopped; several handguns and a small quantity of marijuana were found. Petitioners, each driving one of the four vehicles, were all arrested. Tr. 35-40; Pet. App. A4.

2. Petitioners moved to suppress, arguing that the police lacked probable cause to support the search of the vehicles.[1] The district court denied the motion (Tr. 179-182), concluding that, in the circumstances presented, a magistrate

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[1]Petitioners conceded in the district court that the automobile exception applied (citing *United States* v. *Ross*, 456 U.S. 798 (1982) as the controlling authority), and argued only that probable cause was lacking (see Tr. 158-164, 179).

"clearly would not have hesitated to issue a warrant" (Tr. 182).

The court of appeals affirmed (Pet. App. A1-A11). Petitioners argued for the first time on appeal that the automobile exception could not be invoked to justify the search of the motor homes, on the theory that such vehicles should enjoy the same Fourth Amendment protection as a fixed residence.[2] The court of appeals rejected this argument, holding that because the motor homes in this case were being used solely for transportation purposes, *i.e.*, as trucks, petitioners could not claim that they enjoyed the same expectation of privacy as in a home (*id.* at A6-A10).

3. Petitioners contend (Pet. 10-22) that the court of appeals erred in holding that the warrantless search of the motor homes in this case was justified under the "automobile exception." They contend that this case presents the same question that is currently before this Court in *California* v. *Carney*, No. 83-859 (argued Oct. 30, 1984). Because petitioners have shown no cause for their failure to seek suppression on this ground in the district court prior to trial, the claim is waived. Fed. R. Crim. P. 12. See *United States* v. *Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 431 U.S. 959 (1977). In any event, as the court of appeals correctly held (Pet. App. A7), the decision in *Carney* will have no effect on the proper resolution of this case.

In *Carney*, the California Supreme Court held that the warrantless search of the motor home in that case violated the Fourth Amendment. *People* v. *Carney*, 34 Cal.3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983). The facts in that case were quite different from those presented here. The

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[2]The government pointed out that petitioners had conceded the applicability of the automobile exception in the district court, but the court of appeals nonetheless addressed the issue.

motor home in *Carney* was not stopped in transit, but was searched while it was parked, and the circumstances indicated that it was being used, at least to some extent, for purposes other than transportation. By contrast, the motor homes here were stopped by the police while they were in transit on the highway.[3] Moreover, because of their surveillance, the officers knew that petitioners were sleeping in motel rooms and therefore that the motor homes were not being used as residences, but rather just as large trucks. When they stopped the Winnebagos, the officers knew that the vehicles had been rented, driven from the Holland residence to another city, parked in commercial parking lots while petitioners rented motel rooms, and were apparently in the process of beginning the return trip loaded with cargo.[4]

Even assuming arguendo that a motor home, because of its specialized construction and intended use, should ordinarily be afforded the constitutional protections of a dwelling, such a rule surely should not apply when it is apparent that the motor home is not being used even temporarily as a place to live, but rather solely as a large-capacity means of transport. In such a situation, none of the privacy considerations that might make a motor home more akin to a

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[3]Even the defendant in *Carney* acknowledged that the automobile exception probably ought to apply when the motor home is stopped on the highway. See Resp. Br., No. 83-859, at 28, 32-33, 35.

[4]As we argued in our brief as amicus curiae in *Carney*, we believe that the motor home in that case was also subject to warrantless search. The motor home was parked downtown in a public parking lot, and the facts did not indicate that it was being used even temporarily as a fixed residence. Even if *Carney* is affirmed, however, there is no reason not to apply the automobile exception in a case like this one, where it was clear to the officers that the motor home was being used solely for transportation.

residence than to a vehicle are applicable. Thus, as petitioners themselves assumed in the district court, the motor homes in this case should be treated just like any other vehicle for Fourth Amendment purposes, and the warrantless searches based on probable cause were valid.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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